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No. 95-1223

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

A.A. & M. CARTING SERVICE, INC.; FARMINGDALE CARTING SERVICE, INC.; NATALE PEPE WASTE CORP.; PGS CARTING CO., INC.; JOSEPH S. CELANO; MARIANNE CELANO; JC INDUSTRIES, INC.; C.B.S. RUBBISH CO., INC.; FARMINGDALE INDUSTRIAL PARK ASSOCIATION; MINERSFUEL COMPANY, INC.; RESOURCE CONSERVATION CORP.,

Petitioners,

v.

TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as Commercial Waste Collecting and Recycling District; TOWN BOARD OF TOWN OF BABYLON; RICHARD H. SCHAFFER; BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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35 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	9
APPENDIX:	
Sanifill, Inc. v. Kandiyohi County, C4-95-1363 (Minn. Dist. Feb. 8, 1996)	1a

TABLE OF AUTHORITIES

CASES — Page

Blue Circle Cement, Inc. v. Board of Comm'rs, 27 F.3d 1499 (10th Cir. 1994) 5, 6

C&A Carbone v. Town of Clarkstown, 114 S. Ct. 1677 (1994) ..... *passim*

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) 5

Elrod v. Burns, 427 U.S. 347 (1976) 8

Gardner v. Michigan, 199 U.S. 325 (1905) 5

Harvey & Harvey, Inc. v. Chester, 68 F.3d 788 (3d Cir. 1995), *petition for certiorari filed sub nom. Tri-County Indus. v. County of Mercer*, 64 U.S.L.W. 3510 (U.S. Jan. 30, 1996) 5, 6

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (U.S. Feb. 20, 1996) 2

Sanifill, Inc. v. Kandiyohi County, C4-95-1363 (Minn. Dist. 1996) 3, 6, 7

Socialist Workers Party v. Attorney General, 419 U.S. 1314 (1974) 8

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) 6, 7

West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) 4, 6

MISCELLANEOUS

Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 Fordham Urb. L. J. 361 (Winter, 1995) 2

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PETITIONERS' REPLY BRIEF

ARGUMENT

Petitioners have demonstrated that in the aftermath of this Court's decision in *C&A Carbone v. Town of Clarkstown*, 114 S.Ct. 1677 (1994), municipalities have busily constructed various schemes designed to maintain their protectionist flow control regimes and that courts

of appeals have been receptive, and dangerously inventive, in validating these efforts by minimizing *Carbone*'s mandate and stretching the still-to-be-defined market participant doctrine beyond recognition. Given the huge financial stakes involved, the nationwide struggle over flow control and the critical nature of these issues for Commerce Clause jurisprudence, review is clearly justified.

In opposing review, respondents assert the existence of a fairy-tale world where municipalities have tried diligently to follow *Carbone* and the federal appellate decisions upholding their flow control schemes are consistent with each other, obedient to *Carbone* and based on an easily-applied, "crystal clear" market participant doctrine. Respondents seek to characterize the instant case as a purely local skirmish between "sour grapes" losing garbage collection bidders and the municipality. Respondents' contentions cannot withstand scrutiny and, indeed, highlight the need for Supreme Court review.

1. Respondents initially seek to denigrate the significance of this case by arguing that since municipalities employ varied and innovative efforts to manage their waste, review of Babylon's system is either inappropriate or of limited value. Town Opp. at 5; BSSCI Opp. at 6-7. In fact, Babylon's regime, which combines regulatory requirements and economic imperatives, is a cutting-edge device employed by municipalities seeking to perpetuate their flow control systems [1] as opposed to cruder contractual methods.[2] For example, subsequent

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[1] *See* Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 Fordham Urb. L. J. 361 (Winter, 1995).

[2] In contrast, *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (U.S. Feb. 20, 1996) (Nos. 95-782 & 95-1015) involved a town's use of a contractual provision with the waste collector to require disposal at the local facility. *SSC* would have been a poor vehicle for review of current flow control issues because petitioner there had signed the allegedly offensive contract and Smithtown had cross-appealed the validity of its ordinance—a clear effort to relitigate *Carbone*.

to the filing of the Petition for Certiorari in this case, a Minnesota state court struck down, on dormant Commerce Clause grounds, a flow-control plan remarkably similar to Babylon's that utilized economic incentives to discourage out-of-county and out-of-state waste disposal. *See Sanifill, Inc. v. Kandiyohi County*, C4-95-1363 (Minn. Dist. Feb. 8, 1996) (unpublished opinion) (Reply App. at 1a-22a). The Minnesota court concluded that a waste management service fee imposed by the county combined with a below-market tipping fee at its local facility effectively eliminated competition from out-of-state landfills (*id.* at 22a); here, the "free" disposal offered by Babylon to BSSCI effectively eliminates competition from out-of-state disposal facilities. The Minnesota court also noted that only customers who previously had their waste hauled out-of-county or out-of-state were adversely affected by the new waste management service fee (*id.* at 18a); here, Babylon commercial waste generators are required to pay twice to dispose of their waste other than at the local facility. The similarity of the waste flow plans in this case and in *Sanifill* demonstrates that this case is a particularly good vehicle for consideration of post-*Carbone* waste flow issues because it represents a prime example of the sophisticated, advanced efforts by municipalities to evade *Carbone* and maintain their protectionist plans.

2. The Town next contends that petitioners played and lost on a level playing field in the Town bidding process for garbage collection and have thus forfeited their right to review. Town Opp. at 7-8.[3] This is patently

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[3] Respondents repeatedly seek to characterize this case as simply a dispute about garbage *collection*. Town Opp. at 3; BSSCI Opp. at 5. The key issue in this case, however, as in *Carbone*, is the effect of Babylon's waste flow scheme on the interstate market for waste *disposal*. Thus the right of a town to *collect* trash itself through municipal employees and equipment, and financed by general taxes, is essentially beside the point—particularly since this is not in fact what Babylon has chosen to do.

false. Petitioners do include local waste collection companies that were bid participants; but they also include an out-of-state waste disposal facility that previously received commercial waste from Babylon, a motor carrier engaged in interstate transportation of solid waste and commercial waste generators within the town's commercial garbage district—none of whom ever had an opportunity to "play on the field" at all. It is the out-of-state interests who have been particularly discriminated against by Babylon's hoarding of solid waste—as petitioners' brief emphasized. Petition at 12-14. Even the Second Circuit did not rely on a "level playing field" argument to dismiss petitioners' claim of discrimination in waste disposal, but rather on its determination that the Town was a waste disposal "market participant," free from Commerce Clause scrutiny. Pet. App. 36a-38a.

3. The Town also contends that Babylon's plan was faithful to *Carbone* because it has employed both taxes and bonds. Town Opp. at 2-3. This is fallacious for two reasons. First, Babylon does not in fact rely wholly on taxes and bonds to subsidize its disposal facility. Rather, the financial heart of the scheme is the volume-based user fees assessed on commercial waste generators which, unlike general taxes, involve a direct assessment imposed on potential customers of out-of-state facilities for the benefit of the local facility. *See West Lynn Creamery, Inc. v. Healy*, 114 S.Ct. 2205, 2214-15 (1994) (nondiscriminatory tax coupled with local subsidy held to discriminate against interstate commerce). Second, and even more important, Babylon did not stop with user fees and subsidies. It also (a) insured that the sole licensee would take trash to the local facility by providing "free" disposal at that facility—but nowhere else (Pet. App. 11a); (b) prohibited commercial waste generators from having their waste picked up by anyone other than the Licensee (Pet. App. 10a-11a); (c) prohibited commercial waste generators from transporting their own waste unless they can obtain a special "exemption" on a

showing of "exceptional circumstances" (Pet. App. 13a); and (d) as a final insurance, retained the contractual right to direct the Licensee to take waste to a specified facility (Pet. App. 104a).[4]

4. Respondents next contend that this case does not warrant review because Babylon has simply exercised the well-established "municipal core function" of garbage collection and disposal, arguing that petitioners wrongly suggest that *Carbone* overruled two 1905 decisions of this Court. Town Opp. at 3; BSSCI Opp. at 2-4.[5] Petitioners have never suggested that those cases are not good law; however, since they did not address the Commerce Clause at all, they are irrelevant. Moreover, the Town's characterization of its activities as simply a municipal function is wholly inconsistent with its reliance on the market participant doctrine, which presupposes a private market in which the Town "participates" alongside private businesses.

5. The Town next attempts to mask the strained, twisted efforts of the Second and Third Circuits[6] to uphold these schemes by making the astonishing assertion that the opinions of those Circuits are consistent with each other and an opinion of the Tenth Circuit[7] and jibe

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[4] The Town's contention (Town Opp. at 9) that this contractual provision only applies "in the hypothetical eventuality that the town incinerator is out of service" is wholly inconsistent with the language of Article 18 of the contract, which gives the town the right, *without limitation*, to "direct the Contractor to dispose of the waste collected pursuant to the Agreement at any Disposal Site or Materials Processing Facility." Pet. App. 104a.

[5] *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905).

[6] *Harvey & Harvey, Inc. v. Chester*, 68 F.3d 788 (3d Cir. 1995), *petition for certiorari filed sub nom. Tri-County Indus. v. County of Mercer*, 64 U.S.L.W. 3510 (U.S. Jan. 30, 1996) (No. 95-1127).

[7] *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994).

with *Carbone*. The Third Circuit opinion in *Harvey*, by its own terms, stands alone; that Court conceded: "we cannot cite any authority for th[is] sort of inquiry. . . ." 68 F.3d at 802. And the Tenth Circuit decision in *Blue Circle* does not even involve flow control. The Second and Third Circuit decisions are consistent, therefore, only in their sidestepping of *Carbone*'s central mandate to strike down plans which by their "effect and design" discriminate against interstate commerce.

6. Respondents strive mightily to limit *West Lynn Creamery*'s application to this case, terming it "unpersuasive" and "not intended to be relevant to Babylon." Town Opp. at 10; BSSCI Opp. at 6. Their efforts fail. Respondents cannot escape the Second Circuit's error in ignoring *West Lynn Creamery*'s mandate that a reviewing court must scrutinize a municipality's program on a form-over-substance basis and "as a whole," rather than piecemeal. The lower court's failure to heed this direction led directly to its conclusion that no discrimination against interstate commerce had been shown. In contrast, the Minnesota district court in *Sanifill*, after a thoughtful analysis of *West Lynn Creamery* (Reply App. at 20a-22a), properly concluded that the combined effect of a "seemingly neutral fee" and a subsidy to a local facility results in discrimination against interstate commerce.

7. The Town's claim that the market participant doctrine is "clearly defined" and needs no clarification (Town Opp. at 12) has a hollow ring. This Court itself has stated that "the precise contours of the market-participant doctrine have yet to be established,"[8] while lower courts have expressed their uncertainty about application of the doctrine. Petition at 16-18. Indeed, the fact that petitions for certiorari have been filed repeatedly in market participant cases (Town Opp. at 12) simply highlights

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[8] *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (plurality opinion).

the need for this Court finally to provide guidance to lower courts struggling with the doctrine.

In seeking to uphold the Second Circuit's designation of Babylon as a market participant, the Town first contends that this Court has authorized a component-by-component analysis under the market participant doctrine, relying on the plurality opinion in *Wunnicke*. Town Opp. at 16. In fact, *Wunnicke* implicitly barred such a piecemeal approach by striking down an Alaska regulation because the actions of the state in a market in which it *was* a participant had "a substantial regulatory effect outside of that particular market." 467 U.S. at 97. The Second Circuit's component-by-component analysis precluded consideration of the impact on one market of actions taken in another. This is directly contrary to the mandate of *Wunnicke*.

The Town's further assertion that this Court has rejected the "design and effect" inquiry in market participant cases (Town Opp. at 14-15) simply reflects its misunderstanding of that doctrine. A municipality that acts as a market participant is not subject to Commerce Clause scrutiny at all; as a result, a court has no occasion to examine the "design and effect" on interstate commerce of the challenged program.

Finally, the Town wholly fails to address petitioners' contention that Babylon cannot be deemed a market participant when it has used its regulatory power to destroy the market and create a monopoly for itself and compelled third parties to deal only with it. The market participant doctrine does not countenance that result and the Town does not and cannot claim otherwise.[9]

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[9] The *Sanifill* court found the Second Circuit's market participant analysis in Babylon to be unpersuasive and correctly barred the county's market participant claim, finding that the county was "not part of an open market controlled by competition . . . but rather a closed, regulated market, made so by the County's enactment of the Waste Management Service Fee." Reply App. at 12a.

8. As to whether a Commerce Clause violation constitutes irreparable harm, respondents claim that petitioners failed to address the district court's finding that because the alleged injuries involved are financial, they cannot be irreparable. Town Opp. at 19; BSSCI Opp. at 7-8. However, Section III of petitioners' brief addresses exactly that issue—whether a constitutional injury constitutes irreparable injury, *even where the injury is economic in nature*. The petition points out that the lower courts are in disarray on that issue; the Town's citation of a few cases on one side of the issue does nothing to disprove that point.

The Town also asserts that this Court has "already decided that deprivation of a constitutional right does not automatically constitute irreparable injury," citing the opinion of Justice Marshall, as Circuit Justice, denying a stay in *Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1318 (1974). Town Opp. at 18. *Socalist Workers*, of course, is only the opinion of a single Justice and not an opinion of the entire Court. Beyond this, *Socalist Workers* did not even discuss irreparable injury, but focused on the court of appeals' balancing of the competing interests and various representations made by the Government with respect to its intended conduct. In any event, *Socialist Workers* preceded this Court's decision in *Elrod v. Burns*, 427 U.S. 347 (1976), which squarely held that a deprivation of rights under the same constitutional provision at issue in *Socialist Workers* (the First Amendment) does constitute irreparable injury for purposes of injunctive relief.

In sum, respondents fail to counter the point that this case raises an important constitutional issue upon which there is a disarray among the lower courts, and which this Court has not yet addressed—whether a deprivation of rights under the Commerce Clause constitutes irreparable injury.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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STATE OF MINNESOTA
COUNTY OF KANDIYOHI

IN DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CIVIL DIVISION

Court file no. CA-95-1363

SANIFILL, INC.,
Plaintiff,

vs.

KANDIYOHI COUNTY, MINNESOTA,
Defendant.

ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF

The above-entitled matter came on for hearing before the undersigned, one of the Judges of the District Court, on December 28, 1995, upon the motion for summary judgment by the Plaintiff on Count II of its complaint. Timothy R. Thornton, Esq., and Jack Y. Perry, Esq., appeared representing the Plaintiff. Thomas L. Johnson, Esq., and Ben I. Omorogbe, Esq., appeared representing the Defendant.

Based upon all the files, records and proceedings herein and the affidavits submitted by the parties, the Court hereby issues the following Order and Memorandum.

ORDER

IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion for summary judgment relating to its Commerce Clause claim, Count II of the complaint herein, is GRANTED.

2. Defendant Kandiyohi County's request for summary judgment on the Commerce Clause claim is DENIED.

3. Defendant Kandiyohi County is hereby permanently enjoined from enforcing the Waste Management Service Fee and Facility Fee set forth in Sections XXV, Subd. 14 and XXIV, Subds. 2 and 2A of the Kandiyohi County Amended Solid Waste Ordinance. Nothing herein shall prevent or restrict Kandiyohi County from assessing a tipping fee for soild waste disposed of at the County landfill.

4. A ruling on the Plaintiff's request for damages and attorney's fees pursuant to 42 U.S.C. Sections 1983 and 1988 is DEFERRED. The Court currently lacks sufficient information regarding Plaintiff's claims relating to that count.

5. The attached memorandum is incorporated by reference and made a part hereof.

LET JUDGMENT AS SET FORTH HEREIN BE ENTERED FORTHWITH.

BY THE COURT:

/s/ Gerald J. Seibel
GERALD J. SEIBEL
Judge of District Court

Dated: February 8, 1996

MEMORANDUM OF THE COURT

FACTUAL BACKGROUND

Defendant Kandiyohi County, Minnesota ("County") owns and operates a landfill near New London, Minnesota.

Plaintiff Sanifill, Inc. is in the business of hauling waste. In addition, Plaintiff owns and operates two landfills, one in McCloud County, Minnesota and one in Dickinson County, Iowa. Between June 1 and July 27, 1995, Sanifill purchased three waste hauling companies operating in Kandiyohi County. Prior to 1995, these companies had collected approximately one-third of the waste generated in the County.

Prior to enactment of the fees challenged herein, the County charged a disposal fee (variously referred to as "tipping fee," "Facility Fee," or "Facility Service Fee") of $50.60 per ton for disposal of waste at the County landfill. The landfills owned by Sanifill charge significantly lower tipping fees.

On or about August 17, 1995, Sanifill informed Jeffrey Bredberg, the Director of Environmental Services for Kandiyohi County, that Sanifill planned to utilize its own landfills unless the County offered a more competitive tipping fee. Sanifill stated that a tipping fee in the $25.00 range would eliminate Sanifill's incentive to haul garbage elsewhere.

As a result of this notification, Mr. Bredberg began to contemplate other revenue sources for the County, including the possible enactment of a Waste Management Service Fee.

On August 30, 1995, Sanifill began exporting waste collected in Kandiyohi County to its own facilities, including the facility located in Iowa.

During a September 6, 1995 meeting of the County Board of Commissioners, Jeffrey Bredberg informed the

Board that Sanifill intended to continue hauling trash out of the County for disposal. The minutes of the meeting include the following: "Bredberg stated that with the loss of this income there is a need to look at options in which to raise the additional monies to maintain the landfill. Bredberg stated that some of the options would be to increase the property taxes, a designation, organize collection, County provides the collection, sell the landfill or a waste management fee." (Minutes of September 6, 1995 Kandiyohi County Board of Commissioners Meeting, Exhibit 1 to Affidavit of Jack Perry filed October 23, 1995, at page 1.)

Two week later, at the September 20, 1995 meeting of the County Board of Commissioners, Mr. Bredberg proposed the enactment of a Waste Management Service Fee. In describing the proposed fee, Mr. Bredberg stated as follows:

> Currently our tipping fee is $50.60. We're breaking that fee now down into a waste management fee of $25.60 and a facility service fee of $25.00 per ton. So what we're doing with this facility—or with this fee schedule is just kind of revamping or how can I say, revising our old tipping fee. We are not increasing our tipping fee, we're not lowering it.

(Transcript of September 20, 1995 Meeting, Exhibit 2 to Affidavit of Jack Perry filed October 23, 1995, at page 3.)

On October 4, 1995, the County Board adopted certain amendments to the Kandiyohi County Solid Waste Ordinance (the "Ordinance"), including the establishment of the $25.60 Waste Management Service Fee and the reduction of the Facility Fee at the County landfill to $25.00. Listed below are relevant provisions of the Ordinance as amended. For purposes of this Ordinance, Sanifill, Inc. constitutes a "Commercial Hauler."

SECTION XXIV: THE SOLID WASTE DISPOSAL FEE SCHEDULE FOR KANDIYOHI COUNTY

. . . .

Subd. 2. FEE SCHEDULE

This subdivision applies to fees collected under Section XXV, Subd. 14.02 (Solid Waste Management Agreement Option). State sales tax, Greater MN Landfill Cleanup Fee, and Solid Waste Agreement Fee may be added to these fees.

2.01	Waste Management Service Fee	$25.60
2.02	Facility Fee	$25.00
2.03	Out of County Waste: Waste Management Service Fee and Facility Fee plus additional $.0124 per pound:	$75.59

2.04 Required statement on monthly billing statement to customers of commercial haulers: "This bill includes the Kandiyohi County Waste Management Fee of $.0253 per pound charge which is used to provide [and] operate the Kandiyohi County Waste Management service and facilities. Your hauler is collecting this fee for the County."

Subd. 2A. This subdivision applies to fees collected under Section XXV, Subd. 14.03 (Solid Waste Service Charge). State sales tax, Greater MN Landfill Cleanup Fee, and Solid Waste Assessment Fees may be added to these fees.

. . . .

Subd. 2A.03 ROLL-OFF CONTAINERS COMPACTED OR LOOSE

(Mixed Municipal Solid Waste only).

[Rate of $50.60 per ton for each container size listed.]

(1) The $50.60 per ton is comprised of the $25.60 per ton Waste Management Service Fee plus the $25.00 per ton Facility Service Fee.

2A.04	Facility Service Fee	$25.00 per ton
2A.05	Out of County Waste: Waste Management Fee plus Facility Service Fee and an additional $.0124 per pound, does not include State fees.	$75.59

2A.06 Required statement on monthly billing statement to customers of commercial haulers: "This bill includes a $.0128 per pound Kandiyohi County Waste Management Service Fee. Your Charge is set by the County and is based on average weights per container for the size of container(s) you use. Your hauler is collecting this fee for the County. Your hauler may also be paying the County $.0125 per pound for use of the Kandiyohi County Waste Management Facilities.

. . . .

SECTION XXV. COLLECTION, TRANSPORTATION, AND DISPOSAL OF SOLID WASTES.

. . . .

Subd. 14. WASTE MANAGEMENT SERVICE FEE & FACILITY FEE

14.01. Kandiyohi County hereby imposes a Waste Management Service Fee on the generators of Mixed Municipal Solid Waste in Kandiyohi County. The Waste Management Service Fee is imposed upon the act of generating Mixed Municipal Solid Waste.

a. The Waste Management Service Fee will be based on a per ton rate or substantially equivalent per average volume measurement as set forth by the action of the County Board in Kandiyohi County.

b. By action of the County Board, the County may select the methods it deems necessary and reasonable for the proper collection, reporting and verification of the Waste Management Fees. The County imposes the right to audit the customer and the business records of Commercial Haulers only to the extent necessary to assure that public funds generated by the creation of Mixed Municipal Solid Waste are properly collected and remitted to the County. All access to such records will be made in a reasonable way and will be held as private data. These methods will apply to Section XXV, subd. 14.02 and 14.03.

c. All Persons delivering Mixed Municipal Solid Waste to the Kandiyohi County Sanitary Landfill or other authorized County facilities will be required to sign statements of Solid Waste Origin. Commercial Haulers will be required to list the final disposal location of Mixed Municipal Solid Waste collected in Kandiyohi County.

d. All Commercial haulers are subject to the Service Charge System unless they are operating under a Solid Waste Management Agreement.

14.02. Solid Waste Management Agreement—Kandiyohi County may enter into a voluntary agreement with each Commercial Hauler to deliver or have delivered all or any portion of the Mixed Municipal Solid Waste collected by the Hauler to the Kandiyohi County Sanitary Landfill. If a Commercial Hauler is not operating under a Solid Waste Management Agreement, the Commercial Hauler shall comply with the Service Charge System, as set out in Section XXV, Subd. 14.03 of this Ordinance.

a. The Commercial Hauler shall be charged, by Kandiyohi County, a Waste Management Fee, including a Facility Fee, and a Waste Management Service Fee, according to the Fee Schedule, set out in Section XXIV, Subd. 2, of this Ordinance.

b. Disclosure required. A Commercial hauler shall disclose to their customers all information required per Minnesota Statute 115A.9302 WASTE DEPOSIT DISCLOSURE. The Commercial Hauler shall submit the same report in writing to Kandiyohi County. If at any time after the annual report, the Commercial Hauler shall use a disposal location not reported to the customers and the County, the Hauler shall make an additional report in writing to all of its customers and to the County.

c. The Commercial hauler shall display on the customer's billing statement the waste management cost information in the manner specified in Section XXIV, Subd. 2.06 [2A.06].

d. The Commercial Hauler, acting through its drivers, shall state the origin of collected Mixed Municipal Solid Waste on the Facility scale ticket.

e. Commercial Haulers shall remit the Waste Management Fees they have collected from Kandiyohi County Generators to the Kandiyohi County Auditors Office. Remittance shall be on a monthly basis payable by the 30th of the month in which the statement was received. Kandiyohi County reserves the right to audit the accounts receivable and other records of the Commercial Hauler, including customer accounts, as necessary to verify the accuracy of the Waste Management Service Fee and remittances. County staff will perform the audit at no cost to the Commercial Hauler except in the event discrepancies and/or violations are noted or the Commercial Hauler's records are incomplete or incorrect, the County may calculate the correct remittance due to the County and charge the cost of the necessary work to the Commercial Hauler. The Commercial Hauler must provide surety as provided by Kandiyohi County's Waste Management Credit Policy. Failure to remit Waste Management Fees collected will result in the revocation of the Commercial Hauler's license.

14.03. Service Charge System—The liability for Waste Management Fees, including the Waste Management Service Fee, may only be discharged by remitting to Kandiyohi County the Waste Management Fees required by Kandiyohi County Solid Waste Ordinance, Section XXIV. All persons may remit the Waste Management Fees required by the Fee Schedule of Kandiyohi County, when Mixed Municipal Solid Waste is delivered to the Facility, or by payment to the Kandiyohi County within one month of delivery to a non-County owned facility or by payment to a Commercial Hauler.

a. The Commercial hauler shall collect from their customers/generators a Waste Management Service Fee according to the Fee Schedule and remit the Waste Management Service Fee to Kandiyohi County Auditor's Office, in the manner provide[d] in this Section.

b. The Commercial Hauler shall display at least two lines on the customer billing statements noting 1) the charge for the collection and transportation of Mixed Municipal Solid Waste from their customers and 2) the Waste Management Service Fee information in a manner specified in Section XXIV, Subd. 2A.06.

c. Disclosure required. A Commercial hauler shall disclose to their customers all information required per Minnesota Statute 115A.9302 WASTE DEPOSIT DISCLOSURE. The Commercial Hauler shall submit the same report, in writing, to Kandiyohi County. If, at any time after the annual report, the Commercial Hauler shall use a disposal location not reported to the customers and the County, the hauler shall make an additional report in writing to all of its customers and the County.

d. For any Mixed Municipal Solid Waste delivered to the Facility, the Commercial Hauler shall state

the origin of collected Mixed Municipal Solid Waste on the Facility scale ticket and pay the appropriate Facility Fee at the time of delivery or by remittance to the Kandiyohi County Auditor's Office in the same manner as provided in Section XXV, Subd. 14.03 (g) for the remittance of Waste Management Fees.

e. Kandiyohi County shall pay the Commercial Hauler 1.0% of the Hauler's Waste Management Fee remittal to administer Kandiyohi County's billing charges.

f. Each Commercial Hauler shall collect the appropriate Waste Management Fee, including the Waste Management Service Fee, from such residential customer prior to collecting the customer's Mixed Municipal Solid Waste. The Commercial Hauler must provide surety as provided by Kandiyohi County's Waste Management Credit Policy.

g. Commercial Haulers shall remit all Waste Management Fees due and owing the Kandiyohi County Auditor's Office. Remittance shall be on a monthly basis payable within 30 days after the month in which the Commercial Hauler collected the Waste Management Fees from the customer/generator and shall be accompanied by a completed Waste Management Fee Report which will be provided to the Commercial Hauler by the Auditor's Office and which shall be completed in accordance with instructions provided to the Commercial Hauler. Failure to promptly remit Service Charges collected will result in the revocation of the Commercial Hauler's license.

Defendant concedes that at least part of the Waste Management Service Fee is utilized for direct financial support of the County landfill.

By this action, Plaintiff challenges those portions of the Ordinance establishing the Waste Management Service Fee and the Facility Fee, alleging that:

1) The Waste Management Service Fee is an unauthorized fee under Minnesota Statutes § 400.08; and

2) The imposition of the Waste Management Service Fee, in combination with the reduction of the Facility Fee as provided in the Ordinance, violates the dormant Commerce Clause of the Federal Constitution.

Plaintiff also seeks attorneys fees pursuant to 42 U.S.C. §§ 1983, 1988.

DISCUSSION AND ANALYSIS

The thrust of the Plaintiff's motion for summary judgment relating to Count II of its complaint is that the action of Defendant Kandiyohi County in establishing the Waste Management Service Fee of $25.60, in combination with the simultaneous lowering of the County landfill's Facility Fee to $25.00, violates the Commerce Clause of the United States Constitution. Plaintiff asserts that revenue collected from the Service Fee is used to subsidize the County-owned landfill, thus enabling the landfill to artificially lower its Facility Fee. The lower Facility Fee effectively eliminates competition from other landfills, including those located outside Minnesota.

Article I, Section 8, Clause 3 of the United States Constitution provides that "Congress shall have the Power . . . to regulate Commerce . . . among the several states." The Supreme Court recognizes a "dormant" component of the Commerce Clause, which essentially provides that in the absence of express regulation by Congress, a state's power to discriminate against interstate commerce is limited. *Hughes v. Oklahoma,* 441 U.S. 322, 326, 99 S. Ct. 1727, 1731, 60 L.Ed.2d 250 (1979).

The initial step in analyzing the Plaintiff's motion for summary judgment is to determine whether the fees established by Kandiyohi County are governed by the Com-

merce Clause in the first instance. The parties do not dispute that solid waste is an article of commerce which could be subject to the protection of the Commerce Clause. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624, 98 S. Ct. 2531, 2535-36, 57 L.Ed.2d 475 (1978). Indeed, as Justice Kennedy sets forth in *C & A Carbone v. Town of Clarkstown,* 511 U.S. ——, 114 S. Ct. 1677, 128 L.Ed.2d 399, 408 (1994), "[W]hat makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it."

The County argues that with regard to waste disposal, the County is a "market participant," buying and selling goods as a private entity in the open market. As such, the County asserts, the activities at issue are not governed by the Commerce Clause. *White v. Massachusetts Council of Constr. Employers, Inc.,* 460 U.S. 204, 200, 103 S. Ct. 1042, 75 L.Ed.2d 1 (1983); *U.S.A. Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272 (2nd Cir. 1995).

The County's argument in this regard is not persuasive. The thrust of the "market participant" theory is that the governmental entity is participating in the open market. However, waste disposal in Kandiyohi County is not part of an open market controlled by competition and the law of supply and demand, but rather a closed, regulated market, made so by the County's enactment of the Waste Management Service Fee. Thus, the fact that the County is in the landfill business does not in and of itself entitle it to immunity from Commerce Clause scrutiny. This conclusion is further supported by the numerous cases in which governmental entities passed waste disposal designation laws that were subsequently found to be in violation of the Commerce Clause. *See, e.g., C & A Carbone v. Town of Clarkstown,* 511 U.S. ——, 114 S. Ct. 1677, 128 L.Ed.2d 399 (1994); *Waste Systems Corp. v. County*

of Martin, Minn., 985 F.2d 1381 (8th Cir. 1993); *National Solid Waste Management Ass'n v. Williams*, 877 F. Supp. 1367 (D. Minn. 1995). Accordingly, because the County used its legislative power to regulate the market, it is not entitled to the protection of the "market participant" theory. The Court concludes that the Waste Management Service Fee and the Facility Fee are properly the subject of Commerce Clause scrutiny.

The United States Supreme Court has established an analytical framework to be applied in Commerce Clause cases. The first step is to determine whether the state action at issue discriminates against interstate commerce. Once this is done, the appropriate level of scrutiny can be applied.

Discrimination can exist in several forms. First, the regulation may be discriminatory on its face, most examples of which involve laws that prohibit intertsate exportation or importation of products. *E.g., Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 67 L.Ed.2d 475 (1978) (statute prohibiting importation of waste was discriminatory on its face). So called "waste designation" ordinances, mandating that waste be disposed of only at a certain in-state location, are invalid. *E.g., Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381 (8th Cir. 1993) (waste designation ordinance constitutes economic protectionism in violation of Commerce Clause).

The second, more subtle type of discrimination consists of those actions which are neutral on their face, but which are discriminatory in purpose. This type of state action is best illustrated by *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263 (8th Cir. 1995). In *SDDS*, a private business which had obtained a state permit to construct a solid waste disposal facility in South Dakota challenged a state referendum which essentially vetoed the statute giving the company authorization to construct the facility. The state referendum, which had been generated by a negative publicity campaign against the out

of state business, was found to be discriminatory in its underlying purpose, and ultimately unconstitutional. *Id.* at 270, 272.

The third type of discrimination subject to Commerce Clause scrutiny is facially neutral regulation which has a discriminatory effect. This occurs when a state "respond[s] to legitimate local concerns by discriminating arbitrarily against interstate trade." *Id.* at 267 (quoting *Maine v. Taylor,* 477 U.S. 131, 148, n.19 (1986)).

If state action is deemed to discriminate on its face, in its purpose, or in its effect, then that action is subjected to the strictest type of scrutiny by the courts. In fact, a discriminatory state action is subject to a "virtually per se rule of invalidity." *Oregon Waste Sys., Inc. v. the Department of Envtl. Quality of the State of Oregon,* 511 U.S. ——, 114 S. Ct. 1345, 1351, 128 L.Ed.2d 13 (1994); *Hughes,* 441 U.S. at ——, 99 S. Ct. at 1736-37. If the state action is determined to contain no patent discrimination against interstate commerce, the regulation is subjected to a more flexible balancing test that focuses upon whether legitimate legislative objectives have been credibly advanced. This is the so-called *Pike* test set forth in *Pike v. Bruce Church,* 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970).

In applying this Commerce Clause analysis to the Waste Management Service Fee and Facility Fee enacted by Kandiyohi County, it is clear that the fees are not discriminatory on their face. The Waste Management Service Fee applies equally to all generators of waste within the County. The Facility Fee applies equally to all present who dispose of waste at the landfill. However, it is also clear that discrimination exists within the underlying purpose of the Ordinance. Kandiyohi County goes to great lengths to convince this Court that the imposition of the Waste Management Service Fee and Facility Fee is nothing more than the continuous progression of the overall waste management plan for the county,

necessitated more by the effect the fees will have in reducing the generation of solid waste and promoting recycling than by economic protectionism favoring the County's interests over those of the local waste haulers.

It is interesting to note the development of the County's waste management plan. In 1980 the Minnesota State Legislature enacted Minn. Stat. Chapter 115A, the Waste Management Act, which sets forth the framework for waste management throughout the state. Section 115A.16 of the Act required counties to adopt comprehensive waste management plans. One of the purposes of Chapter 115A was to impose on the counties stringent solid waste recycling goals. By November 31, 1993, each county was required to recycle a minimum of twenty-five percent of the total solid waste generated within the county. This requirement is to be increased to thirty percent on December 31, 1996.

Kondiyohi County adopted its initial Solid Waste Management Plan in 1987. In 1988, the County adopted a Solid Waste Ordinance implementing the plan, and in 1991, amended the plan to include a Solid Waste Reduction and Recycling Program.

The County failed to meet the twenty-five percent recycling goal set for 1993, prompting the Minnesota Office of Environmental Assistance to inquire of the County how it proposed to meet the 1996 recycling goal. In response, the County established a Recycling Advisory Committee to review the problem and propose various options ot the County Board. The advisory committee made several recommendations to the County Board and on December 7, 1994, the County Board adopted three of the committee's recommendations: expansion of curb side collection and drop off recycling programs; increased participation of businesses; and prohibition against local building contractors using the landfill for demolition waste. At this point in time the Director of Environmental Services, Jeffrey Bredberg, began drafting amendments to the County's Solid Waste Ordinance.

Prior to the amendments, the funds utilized to pay for all of the County's waste management services were generated from a $23.86 per ton fee assessed as part of the County property taxes, and a $50.60 per ton disposal fee ("tipping fee" or "Facility Fee") assessed on all waste transported to the County landfill. Faced with interstate competition from the Plaintiff, who could charge customers less by virtue of lower tipping fees at other landfills, the County adopted a new fee structure which incorporated a $25.60 per ton Waste Management Service Fee and a $25.00 per ton tipping fee. Those two fees added together equal the exact amount that the County had previously charged as its tipping fee.

As Mr. Bredberg admits in his affidavit, it was only in August of 1995, when he was advised that the Plaintiff might no longer haul waste to the County's landfill, that he began considering the adoption of a waste management fee. The Court notes that the advisory committee apparently did not recommend implementation of a waste management fee as a possible means to increase recycling in the County. In fact, prior to mid-August of 1995, the waste management fee was barely discussed as a legislative option. It is abundantly clear that the purpose behind the enactment of the Waste Management Service Fee and the corresponding reduction of the Facility Fee was to impede the interstate competition posed by the Plaintiff. Accordingly, the Court finds that the underlying purpose of the Waste Management Service Fee/ Facility Fee scheme was to discriminate against interstate commerce.

The County urges the Court to decouple the Waste Management Service Fee from the Facility Fee and view them separately. Why should the Court decouple these two fees when the County does not? The link between the service fee and the reduction in the tipping fee is undeniable. Both were adopted at the same time, as part of the same ordinance. Together, the two fees net the County precisely the same revenue it earned prior to the

amendments. These facts are not mere coincidence; the fees are *designed* to function together, as amply demonstrated by Mr. Bredberg's September 20, 1995 statement to the County Commissioners that the purpose of the proposed fee scheme was to divide the then-current tipping fee into two parts while maintaining the same total fee. Finally, Defendant concedes that the Waste Management Service Fee subsidizes the landfill. Clearly, this is what enables the County to lower its tipping fee.

Accordingly, the Waste Management Service Fee and the Facility Fee must be analyzed together. If the fee scheme as a whole violates the Commerce Clause, the possible legitimacy of each fee alone will not save the scheme from constitutional infirmity. *West Lynn Creamery v. Healy*, 512 U.S. ——, 114 S. Ct. 2205, 129 L.Ed.2d 157, 170-72 (1994) (Commerce Clause analysis targets both contributions to, and distributions from, a particular fund, legitimacy of each element does not guarantee legitimacy of scheme as a whole).

Even if the Service Fee/Facility Fee structure did not arise out of a discriminatory *purpose*, it is clear that the fee structure discriminates against interstate commerce in its *effect*. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 2084, 90 L.Ed.2d 552 (1986) (court to review overall effect on local and interstate commerce). The combination Service Fee/Facility Fee nets the County the same amount previously raised through the tipping fee alone. Now, however, part of the sum is generated "up front" (that is, upon collection of the garbage). Once the garbage has been collected by the hauler, the lower tip fee at the County landfill, made possible by a subsidy from the service fee, renders other landfills uncompetitive, essentially forcing all haulers to either utilize the services of the County landfill or incur higher total costs due to transportation expenses and/or higher tip fees at other facilities. The artificially lower tip fee at the Kandiyohi County facility essentially constitutes a rebate of the

service fee, available only to those who use the County landfill. Thus, the fee scheme neutralizes any competitive advantage formerly enjoyed by lower-cost out of state landfills.

Considering the issue from the customer's point of view may help further illustrate the Ordinance's discriminatory affect. Prior to the adoption of the fee scheme, County residents whose solid waste was disposed of at the County landfill paid $50.60 per ton. Those residents whose solid waste was disposed at other landfills presumably paid a lesser fee due to lower tipping fees at out of county or out of state landfills. After the adoption of the dual fee system, County residents whose solid waste is disposed of at the County landfill still pay only $50.60 per ton. However, Plaintiff's customers, who previously paid less, now end up paying more because they must pay the $25.60 per ton Waste Management Service Fee over and above the tipping fee required at the disposal site. The only customers who are adversely affected by the dual fee system are those who previously had their waste hauled out of county or out of state.

As support for its action, the County cites several local and state waste haulers who apparently support the measure because it "levels the playing field." That is precisely the problem. When governmental action, as opposed to open market competition, levels the playing field between local and interstate competitors, the result is the very type of economic protectionism that the dormant Commerce Clause is designed to prohibit. The discriminatory effect of the dual fee system upon interstate commerce is further magnified by provisions of the Ordinance which essentially provide that, in the absence of a prior agreement by the hauler to utilize the County landfill, the hauler must collect the Waste Management Service Fee from residential customers *prior* to collecting their garbage. *Compare* Sec. XXV, Subd. 14.03(f) (requiring fee collection in advance) *with* Sec. XXV Subd. 14.02(c) (no similar requirement for haulers operating

under agreement with County landfill). This places additional burdens upon these firms that are involved in interstate commerce.

Having found that the dual fee structure has both a discriminatory purpose and a discriminatory effect, the Court must apply a strict scrutiny standard in assessing the validity of the County's action. Under this standard, "the burden falls on the State to justify (the measure) both in terms of the local benefits flowing from the statute and the unavailability of a non-discriminatory alternative adequate to preserve the local interests at stake." *Oregon Waste,* 511 U.S. at ——, 114 S. Ct. at 1351.

The County asserts that the Waste Management Service Fee and the Facility Fee promote legitimate purposes unrelated to economic protectionism. Specifically, the County claims that its goals are to fund the overall waste management programs of the County, to encourage its residents to reduce the amount of solid waste generated, and to protect its residents from possible liability arising from the contamination of waste disposed of at out of state landfills. It would appear, however, that the fee scheme either fails to promote these goals or constitutes an unnecessary burden on interstate commerce in doing so.

For instance, with regard to funding the County's waste management programs, alternatives exist which are less burdensome to interstate commerce. The County could fund its programs through general tax or bond revenues. *West Lynn,* 512 U.S. at ——, 129 L.Ed.2d at 170 ("A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce"); *C & A Carbone,* 511 U.S. at ——, 114 S. Ct. at 1684, 128 L.Ed.2d at 410 (to ensure survival of its waste facility, "the town may subsidize the facility through general taxes or municipal bonds"). In the alternative, the County could sell the landfill and use the funds to pay off landfill expenses and finance the waste management programs.

Similarly, the County's waste reduction goal is not served by the fees. Prior to the enactment of the fee scheme, residents paid a tipping fee based on the volume of waste generated, regardless of where the garbage was dumped. So, too, with the revised fees . . . the Waste Management Service Fee and current Facility Fee are also volume-based. Thus, residents continue to pay in proportion to the amount of waste produced, and splitting the fee into two parts does nothing more to discourage waste generation than was accompanied through the previous single fee.

Finally, the County claims to be concerned about liability for waste that becomes contaminated at another facility. However, Defendant completely failed to demonstrate how the County facility is any better equipped to prevent contamination than any other landfill.

Accordingly, the Court concludes that the County has failed ot sustain its burden of justifying the Waste Management Service Fee/Facility Fee structure as set forth in the amended Ordinance.

A recent United States Supreme Court case, *West Lynn Creamery, Inc. v. Healy,* 512 U.S. ——, 114 S. Ct. 2205, 129 L.Ed.2d 157 (1994), is particularly instructive on the issues raised by the instant case. In *West Lynn*, a Massachusetts pricing order imposed an assessment on all milk sold to Massachusetts retailers. Although most of that milk was produced out of state, the funds raised by the assessment were distributed exclusively to Massachusetts dairy farmers. The Massachusetts Supreme Court upheld the assessment on the grounds that the pricing order was facially neutral and the local benefits of the order outweighed its incidental burden on interstate commerce.

The United States Supreme Court reversed, holding that the pricing scheme unconstituitonally discriminated against interstate commerce. The Court viewed the assessment as essentially a tax rendering milk produced out

of state more expensive, thus neutralizing the economic advantage that lower-cost out of state producers had enjoyed. The Court noted that although the tax was imposed on all milk regardless of its state of origin, its effect on Massachusetts producers was more than offset by the subsidy granted exclusively to those producers. The Court likened the tax/subsidy scheme to a protective tariff against imported products, "[t]he paradigmatic example of a law discriminating against interstate commerce." *Id.* at ——, 129 L.Ed.2d at 166.

In reaching its decision, the Supreme Court rejected the defendant's argument that because the assessment and the subsidy would separately withstand constitutional challenge, their combination was also valid. The Court stated as follows:

> [W]e cannot divorce the premium payments from the use to which the payments are put. It is the entire program—not just the contributions to the fund or the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favor of local producers. The choice of constitutional means—nondiscriminatory tax and local subsidy—cannot guarantee the constitutionality of the program as a whole.

Id. at ——, 129 L.Ed.2d at 171. Similarly, the Court refused to allow the particular mechanism employed by defendant to limit the Court's inquiry, invoking this oft-quoted passage. "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Id.* at ——, 129 L.Ed.2d at 172.

The Court also rejected defendant's claim that the benefits of the pricing order—protecting the local dairy industry from collapse—outweighed its effect on interstate commerce. The Court reasoned that acceptance of

defendant's argument "would make a virtue of the vice that the rule against discrimination condemns. Preservation of local industry by portecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *Id.* at ——, 129 L.Ed.2d at 174.

In the case at bar, the effect of the Waste Management Service Fee/Facility Fee scheme is similar to the effect of the tax/subsidy scheme struck down in *West Lynn.* In each case a seemingly neutral fee is assessed on a product or activity existing within the jurisdiction. The distribution of that fee, however, is not available to out of state interests. In *West Lynn*, the tax subsidized local dairy farmers, enabling them to lower their prices and thus increase their market share. In the instant case, the service fee subsidizes the local landfill, enabling it to lower its tipping fee and virtually guarantee exclusive access to the waste disposal market.

As in *West Lynn*, Kandiyochi County's claim that the fees are to be analyzed separately must be rejected in favor of a practical view to the overall effect of the fee scheme. And the County's obvious intention to insure the economic survival of the County landfill cannot save the scheme from invalidation; the protection of a local business at the expense of interstate commerce is exactly what the Commerce Clause prohibits.

CONCLUSION

Defendant's Waste Management Service Fee and Facility Fee scheme constitutes an illegal burden on interstate commerce, in violation of the dormant Commerce Clause of the United States Constitution. Thus, Plaintiff is entitled to judgment in its favor on Count II of the complaint herein. The Court's decision regarding Count II renders issues relating to Count I (unauthorized fee) moot.

G.J.S.